BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: KELLY SERVICES 1668 North Main Street Salinas, CA 93906 Employer	Docket No. 06-R1D2-1024 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration.

JURISDICTION

On August 17, 2005, the Division of Occupational Safety and Health (the Division) issued to Kelly Services (Employer) one Citation alleging a General violation of Title 8, Cal. Code of Regulations section 5097(a) [hearing conservation program]. Employer filed a timely appeal. However, Employer did not contest the existence or classification of the violation, but asserted as a defense that, as the primary employer under the Dual Employment Doctrine, it could not be held in violation of the cited Safety Order.

The matter came on regularly for a scheduled hearing on May 24, 2007. On July 23, 2007, a Decision was issued which upheld the Citation, concluding the Employer did not establish the requirements of a primary employer's Dual Employment Doctrine defense. Employer filed a timely Petition for Reconsideration, which we took under submission. After reviewing the record, we hold the Decision correctly concluded Employer did not establish the necessary elements under the Dual Employment Doctrine to avoid imposition of the General violation.

ISSUE

1. Whether the Dual Employment Doctrine relieves this primary employer of its obligation to implement a written hearing conservation program.

EVIDENCE

Employer did not contest the existence or classification of the citation, and instead relied on the Dual Employment Doctrine as a defense. The evidence presented by Employer consists of the testimony of its supervisor, Cheri Mikuls, who oversaw the Orvis work location where Employer's employees were assigned to work, and documents containing the contract between Employer and Orvis under which Employer supplied workers to Orvis, and various items of correspondence.[1]

Pursuant to its contract with Orvis, Employer supplied employees for work in Orvis's factory-like setting. Employer inspected the Orvis facility at least four times per year for overall safety, and when it discovered unsafe conditions, worked with Orvis to bring about changes to the Orvis workplace. Employer's inspector, Cheri Mikuls, testified she noticed the loud noise at Orvis, and asked the Orvis manager whether a noise survey had been done. Mikuls stated she was told by Orvis management that the noise survey was done and showed less than 85dB on a time weighted average.[2] Employer did not ask for a copy of the survey. Employer was not prohibited from performing it's own survey. Employer did not test or monitor employees' hearing, nor did it have a written Hearing Conservation Program.

DECISION AFTER RECONSIDERATION

All Employers are obligated to provide a safe and healthful workplace for their employees. (Labor Code 6400.) This duty is non-delegable. (*Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

An employee may have two employers. This is known as "dual employment." The "primary employer" typically loans or leases the employee to another employer (the "secondary" or "host" employer). The secondary employer typically controls the work of the loaned employee. Both employers are obligated to provide a safe workplace for the employee. (See *Labor Ready*, *supra*.) No statute or regulation specifies who may be cited, as between primary and secondary employers, for various violations. Board precedents, approved by the Court of Appeal, have established the parameters of dual employers' responsibilities. (*Sully-Miller Contracting Co v. Occupational Safety and Health Appeals Board* (2006) 138 Cal.App. 4th 684.)

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[1] Employer also submitted documents purportedly containing the federal OSHA rules regarding dual employment. Federal OSHA is not the governing law in California. (*State Roofing Systems Inc.*, Cal/OSHA App. 08-276, Denial of Petition for Reconsideration (Apr. 28, 2010), citing *United Air Lines, Inc.* v. *Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762).) We apply California law here.

[2] We note this statement is hearsay and does not appear to fall within an exception. Also, the Division did not object to the hearsay statement when it was offered by Employer. We reach the decision herein without resolving the appropriate weight to be given this statement because other evidence shows Employer was not relieved of its duty to protect its workers with a written hearing conservation program.

In *Sully-Miller Contracting Co*, *supra*, the primary employer was held to retain full responsibility for training and monitoring employees even though its employees worked at a secondary employer's location. (*Id.* at 698-699.) "[T]he primary employer's general training responsibilities include 'general safe and healthy work practices and . . . specific instruction with respect to hazards specific to each employee's job assignment.' According to [the Appeals Board's decision in] *PEMCO II*, [ ] 'to meet these Labor Code responsibilities, the primary employer is required to determine with particularity the work which a contract employee will be called upon to perform for the secondary employer.'"

Primary employers are responsible for complying with training and monitoring Safety Orders. Section 5097 is a monitoring Safety Order that requires employers to test employee hearing in a detailed manner set forth therein. For an employer to avoid the citation for any violation, it must show it has fulfilled all requirements for training and monitoring its employees. (*Sully-Miller, supra.*) The requirements *per se* are not in issue here, as Employer failed to have a testing plan or do any testing. It conceded the existence and classification of the Citation.

Even if section 5097 were a non-training or non-monitoring Safety Order, Employer has failed to establish the elements of the Board-created Dual Employment Doctrine defense. That defense has four elements:

> 1. The primary employer maintains an accident prevention program which includes training in general hazards and unique hazards that apply to the work its employees will do for the secondary employer;
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> 2. The loaned employee works entirely at the secondary employer's worksite;
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> 3. The loaned employee is supervised solely by management personnel of the secondary employer; and
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> 4. The primary employer is prohibited (either by contract with, or policy of, the secondary employer) from entering the worksite for purposes of supervising the loaned employee.

(*The Office Professionals*, Cal/OSHA App. 92-604, Decision After Reconsideration (Jun. 19, 1995) citing *Adia Personnel Services*, Cal/OSHA App. 90-1015, Decision After Reconsideration (Mar. 12, 1992), and *PEMCO II*, *supra,* approved by *Sully-Miller Manufacturing Co*, *supra.*) An employer must prove all four elements of the defense to prevail.

The evidence shows Employer failed to establish elements 1 and 4. Regarding element 1, if Employer maintained an IIPP for the Orvis location, it did not place it in evidence and we cannot presume it existed. (*California*

Family Fitness, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).) Regarding element 4, the evidence showed that Employer entered the Orvis workplace frequently for purposes of supervising the loaned employees. Employer was able to implement safety related changes at Orvis for the protection of its Employees. And, those inspections caused Employer's inspector Mikuls concern about the noise level at Orvis.

The Appeals Board previously considered a situation similar to this one. In *Adia Personnel Services*, *supra*, the primary employer was cited for violating section 5144(c) [failure to train on the use of a respirator] and 5144(f)(3) [failure to implement a written respiratory protection program]. These are not section 3203 IIPP violations, but they were considered training obligations of the primary employer which, under *PEMCO II, supra,* and Labor Code section 6400 *et seq*, did not require the primary employer to enter the premises of the secondary employer and make corrective changes. Because the primary employer could satisfy the respiratory protection obligations without interfering with the secondary employer's place of business, they remained the primary employer's obligation.

Likewise, here Employer was cited for failing to implement and maintain a Hearing Conservation Program. Like the respiratory protection program, the Hearing Conservation Program requires monitoring of employees' hearing, and does not require Employer to alter processes at the secondary employer in order to comply with the safety order.[3]

Employer argues it concluded a Hearing Conservation Program was not needed at Orvis because it acted reasonably in failing to know the noise level was such as to require monitoring. Unless the Safety Order allows, an employer's lack of knowledge of a violative condition at a workplace is not a defense to a general violation. (*Glass Pak*, Cal/OSHA App. 03-751 Decision After Reconsideration (Nov. 4, 2010).) In its appeal, Employer conceded the existence of the violation, as well as its classification, which in effect concedes that the sound level was high enough at the secondary employer's location to trigger the need for the Hearing Conservation Program. As the primary employer, Employer remained responsible for compliance with this monitoring Safety Order. And, even if section 5079 were a non-monitoring Safety Order, Employer failed to prove the elements of the applicable affirmative defense.

[3] Section 5097(a) "General. The employer shall administer a continuing, effective hearing conservation program, as described in this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A-scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with Appendix A and Table A-1 and without regard to any attenuation provided by the use of personal protective equipment." This section requires the plan. The remaining sections of 5097, and an appendix, set forth the frequency and manner of testing employee hearing.

For the foregoing reasons, we a deny Employer's appeal and impose the penalty of $375.00.

ART CARTER, Chair
CANDICE TRAEGER, Board Member
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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